IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
October 24, 2006 Session

STATE OF TENNESSEE v. BILLY JOE CARTER

Appeal from the Circuit Court for Cocke County
No. 9273 Ben W. Hooper, Judge

No. E2005-01282-CCA-R3-CD - Filed May 24, 2007

A Cocke County jury convicted the defendant, Billy Joe Carter, of first degree premeditated murder, *see* T.C.A. § 39-13-202(a)(1) (2006), first degree felony murder, *see id*. § 39-13-202(a)(2), and especially aggravated robbery, *see id*. § 39-13-403. The jury sentenced him to life in the Department of Correction without the possibility of parole for the two first degree murder convictions, and the trial court sentenced him to 40 years in the Department of Correction as a Range II, multiple offender for the especially aggravated robbery conviction. The defendant is to serve this sentence consecutively to his life sentence. Aggrieved of his convictions, the defendant appeals on three grounds: (1) that there was insufficient evidence to convict the defendant of any of the charges; (2) that the trial court erred in allowing Ricky Reed, the victim's brother, to testify because Mr. Reed's name was not included on the indictment; and (3) that the trial court erred in admitting autopsy photographs. After reviewing the record, we hold that the evidence was sufficient to convict the defendant on all charges. We also hold that the trial court neither abused its discretion in allowing Mr. Reed to testify nor in admitting the autopsy photographs. Thus, we affirm the judgment of conviction of especially aggravated robbery and the verdicts of guilty of first degree murder. We vacate the judgments of conviction of first degree murder and remand for entry of a judgment on the merger-surviving first degree murder conviction and a notation of the merger of the other first degree murder verdict.

Tenn. R. App. P. 3; Judgments of the Circuit Court are Affirmed in Part, Vacated in Part, and the case is Remanded.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JOHN EVERETT WILLIAMS, J., joined.

David Neal Brady, District Public Defender; and Keith E. Haas, Assistant District Public Defender, for the Appellant, Billy Joe Carter.

Robert E. Cooper, Jr., Attorney General & Reporter; Renee W. Turner, Assistant Attorney General; William Edward Gibson, District Attorney General; and James B. Dunn, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The proof at trial showed that on November 10, 2003, at approximately 12:30 or 1:00 a.m., the defendant and the victim, Clyde Reed, entered William Stuart's house at 450 Old Sevierville Highway in Cocke County to visit with Mr. Stuart's father. Mr. Stuart testified that he was in bed when he heard the men enter and leave. Shortly after the defendant and the victim left the house, Mr. Stuart's father asked Mr. Stuart to jump-start the victim's car. Mr. Stuart complied, helping the victim roll the victim's car out of the Stuart driveway to the side of Old Sevierville Highway, so he could pull his truck beside the victim's car to use the jumper cables. Mr. Stuart testified that the attempts failed; thus, he drove his truck back into his driveway and re-entered his house.

Approximately five minutes later, Mr. Stuart's father left the house and yelled for the victim. After hearing no answer from the victim, Mr. Stuart walked outside and found the victim lying on the ground. He then called 9-1-1.

On cross-examination, Mr. Stuart testified that the defendant was in the victim's car while he and the victim tried to start the victim's car. Mr. Stuart neither spoke to the defendant nor saw the defendant remove a torque wrench from his father's truck. In addition, Mr. Stuart testified that his father's radio scanner was missing after the defendant and the victim left the house, and he identified the missing scanner in court.

Cocke County Deputy Sheriff Eric Rinehart testified that on November 10, 2003, he received a report of a man in the roadway on Old Sevierville Highway near the Stuart residence. When he arrived on the scene, he met Josh Shehee, who related to Deputy Rinehart what he had seen. Deputy Rinehart performed chest compressions on the victim when he arrived at the scene until Emergency Medical Services personnel relieved him.

Deputy Rinehart testified that the victim's face was covered in blood and that he had a "huge hole in his skull." He also observed that the victim's blue jeans were partially pulled down, but he denied moving the victim's body while administering the chest compressions.

Cocke County Deputy Sheriff Kevin Benton testified that on November 10, 2003, he received a report of two individuals fighting on Old Severville Highway. Deputy Benton learned that one person remained at the scene, and the other subject left the scene on foot. Thus, he received an order from his sergeant, Richard Caldwell, to patrol the surrounding area to look for the subject, who was described as being bald or having short hair and wearing a black leather jacket.

Approximately one and one-half miles from the scene, Deputy Benton saw the defendant, who met the description, carried a metal object in one hand and a liquor bottle in the

other, and was covered in blood. The defendant was walking towards Highway 411. Deputy Benton testified that the defendant had blood splatters on his face, pants, shoes, and hands.

Deputy Benton radioed the dispatcher that he spotted the defendant before ordering the defendant to put up his hands. The defendant dropped the items in his hands, walked approximately one car length, and raised his hands. Deputy Benton instructed the defendant to lie on the ground, and after back-up officers arrived, they handcuffed the defendant.

When Deputy Benton searched the defendant, he found a Maglite flashlight, scanner, wallet, toothpick holder, comb, key ring, piece of paper containing a telephone number, toilet bowl freshener, Snuggle dryer sheets, cigarettes, two bandanas, two watches, two knives, two used hypodermic needles, and two unused hypodermic needles. He testified that the wallet contained cards, telephone numbers, and receipts that bore the victim's name. In addition, Deputy Benton testified that he found the items that the defendant dropped, a Traveler's Club liquor bottle and a blood-stained torque wrench.

On cross-examination, Deputy Benton testified that, except for the torque wrench, the items he found were not splattered with blood, and to his knowledge, no one dusted the scanner for fingerprints.

Ricky Reed, the victim's brother, testified that the victim suffered from heart failure and constantly required oxygen from a tank he carried with him. Mr. Reed last saw his brother on November 9, 2003, and he testified that November 10 was the victim's birthday. Mr. Reed testified that on November 9, the victim had on his person $100 to send to their sister and at least two other $20 bills. Mr. Reed also stated that the victim wore a silver and gold round-faced watch and carried a "brownish-looking" Case knife, which the victim had used on November 9 while repairing automobile speakers. At trial, items found on the defendant shortly after the murder were entered into evidence. From these items, Mr. Reed identified a watch, knife, and wallet as having belonged to the victim.

On cross-examination, Mr. Reed testified that he received the victim's car approximately one week after the murder. He stated that he had to jump-start the car, that he had not previously noticed damage to the right fender and right door, and that the victim's oxygen tank was not in the car. Mr. Reed had seen the victim get into fights before, but he explained that because of his poor health, the victim was no longer able to fight. Furthermore, he admitted that the victim had been going to a methadone clinic for treatment. Mr. Reed also admitted that he himself was convicted of burglary in Hamblen County in 1981.

Cocke County Sheriff's Department Sergeant Richard Caldwell testified that he was en route to the scene when he learned that the defendant had been taken into custody. Upon arriving at the place of the defendant's arrest, Sergeant Caldwell collected all evidence found on the defendant, including the flashlight, scanner, and torque wrench. He then took the evidence to Cocke County Sheriff's Department Detective Derrick Woods.

On cross-examination, Sergeant Caldwell testified that he neither searched the victim's car nor secured evidence from the murder scene. While at the murder scene, he did not observe an oxygen tank.

Detective Woods testified that he investigated the murder scene, searching for evidence and diagraming the area. He testified to the position of the body in relation to the victim's car and the Stuart house. He also testified that he found several of the victim's teeth at various locations at the scene.

Detective Woods described the defendant as being "extremely covered in blood," and he identified the clothing the defendant wore the night of the murder, which Detective Woods collected and took to Tennessee Bureau of Investigation ("TBI") Agent Derrick Newport for processing. Detective Woods also testified that he observed blood not only on the clothing but also on the defendant's hands and face. Detective Woods testified that he did not observe any wounds on the defendant and that the defendant never complained to him of being hurt.

At the sheriff's department, the defendant's fingerprints were taken in Detective Woods's presence. Detective Woods also attended the autopsy of the victim's body, and he was present when two vials of blood were drawn. He testified that he turned over all evidence to TBI Agent Newport.

On cross-examination, Detective Woods testified that he did not collect the victim's clothing for examination. He identified the liquor bottle, scanner, bandanas, syringes, two purple and green caplets, four Neurontin pills, two nickels, and five pennies as items he took from the defendant on November 10.[1] Detective Woods did not see any blood on the wallet and stated that had he seen blood on any of the items, he would have noted it. He also identified several bottles of prescription medications and a cellophane wrapper containing assorted pills found in the victim's car. All prescription bottles bore the victim's name, and he did not send any of the medications to the TBI laboratory for analysis. Finally, he testified that when he photographed the defendant and collected his clothing at approximately 7:00 a.m. on November 10, the defendant was coherent and not under the influence of alcohol or drugs.

Doctor Darinka Mileusnic-Polchan testified that she performed the autopsy on the victim's body on November 11, 2003. Doctor Mileusnic-Polchan testified that the victim's body was covered in blood and that she found 22 injuries to the head, which was the most severely injured area. She testified that the victim's face was "caved in" due to the bones' fractures. Doctor Mileusnic-Polchan testified to two large lacerations on the victim's forehead, and she stated that because of the nature of the injuries, she could determine that they were inflicted by a "pretty solid, compact object [that] was relatively long and narrow." She testified that the victim's brain tissue was visible through one of these skull fractures and that the victim bled under the skull into the soft

[1] The caplets, Neurontin pills, nickels, and pennies were not mentioned by Deputy Benton but were contained in the exhibited trial photographs.

tissue and hemorrhaged at the top of the brain. Doctor Mileusnic-Polchan explained further injuries to the victim's nose, lips, and chin area, including tears, lacerations, and bruises. She explained that because of these extensive injuries, "[the victim] was grossly deformed."

Doctor Mileusnic-Polchan testified that the victim aspirated much blood and even aspirated a portion of his dentures, which was found in one of the lungs. In addition, the victim suffered wounds to his hands, located on the external portion of the hand. Doctor Mileusnic-Polchan described defensive injuries to the victim's hands. She also explained "train track" injuries to the victim's stomach and concluded that these were caused by a solid, narrow elongated object. Doctor Mileusnic-Polchan further testified that the head and stomach injuries were caused by an object consistent with a torque wrench. She also testified that the victim suffered a fracture of the hyoid bone, commonly referred to as the Adam's Apple, which she opined was caused by stomping, consistent with the defendant's tennis shoes. Finally, Dr. Mileusnic-Polchan stated that the cause of death was cranial cerebral injuries due to blunt head trauma caused by assault.

On cross-examination, Dr. Mileusnic-Polchan testified that some of the cuts and bruises on the victim's hands could have occurred during a fist fight; however, she opined that they were defensive wounds, not aggressive wounds. She also testified that there were several abrasions, scratches, and cuts on the victim's gluteal region, but she could not identify their cause. Doctor Mileusnic-Polchan also testified that she could not determine if a fist fight ever occurred, but she could determine that the end result was a beating with a weapon.

She testified that as with all homicide cases, she drew the victim's blood to be analyzed by the TBI. The blood contained ethyl or ethanol alcohol well above the legal limit, methadone within the therapeutic range, and cocaethylene, a substance formed when alcohol and the end products of cocaine are present in the blood. Doctor Mileusnic-Polchan testified that the victim's urine contained alcohol and ecgonine methyl ester, which is another breakdown of cocaine. She also testified that the victim had a healing needle mark on his arm. She said, "The track mark is evidence of previous injections of some sort in the area of the antecubital fossa, possibly intravenous drug abuse." Doctor Mileusnic-Polchan further testified that she found no new needle marks.

TBI Agent and Forensic Scientist Bradley Everett testified that he took deoxyribonucleic acid ("DNA") profiles from the defendant's and the victim's blood samples. He then examined the blood found on the defendant's clothing, and he determined that the blood found on the defendant's jeans, undershirt, black tee-shirt, leather jacket, and shoes matched the victim's. Agent Everett also testified that the blood found on the torque wrench and flashlight matched the victim's. Moreover, none of the blood tested matched the defendant's.

Agent Everett testified on cross-examination that he caused neither the tear on the backside of the leather jacket nor the tear on the left knee area of the blue jeans. He stated that he did not test every spot of blood found on the clothing or the torque wrench and flashlight.

TBI Agent and Forensic Scientist David Hoover, with the Latent Prints Unit, testified that he examined the Maglite flashlight for fingerprints. He was unable to find the victim's or the defendant's prints on the flashlight, and he emphasized that this was not unusual. Agent Hoover further testified that he was unable to find the victim's prints on the torque wrench, but he did find the defendant's right middle fingerprint on the wrench.

On cross-examination, Agent Hoover testified that the metals tested were not the best surfaces for retrieving latent prints. He testified that he could not tell the jury who held the flashlight or whether someone other than the defendant held the torque wrench.

Joshua Shehee testified that on November 10, 2003, he was driving on Old Sevierville Highway when he saw the defendant standing over another man in the middle of the road. At first, Mr. Shehee thought that the two men were drunk and that the defendant was trying to help the victim out of the roadway. However, he then saw the defendant beating the victim with a "pipe," which he stated looked like the torque wrench in evidence at trial. Mr. Shehee testified that the defendant was holding the victim by his shirt and beating him in the head, and he asked the defendant to stop. At one point, the defendant did stop beating the victim long enough to ask Mr. Shehee for a ride, but when Mr. Shehee refused, the defendant resumed beating the victim. Thus, Mr. Shehee drove to a convenience store to call the police. He testified that the victim was still breathing when he drove away.

After calling the police, Mr. Shehee returned to the murder scene, and he observed that the victim had been pulled off the roadway and that his pants were partially pulled down. The defendant was not at the scene. Mr. Shehee stayed at the scene until the police arrived.

Mr. Shehee testified on cross-examination that on the 9-1-1 tape he did say that someone was beating the victim with a "stick." He testified at trial that the object was silver. Mr. Shehee admitted that he described the defendant as wearing a red shirt, but he admitted that he might have been mistaken regarding the color, possibly due to the amount of blood on it. He testified that he had previously known the victim and knew that he was not healthy. Mr. Shehee testified that he did not see the victim fight and doubted that he could because "[h]e couldn't hardly breathe." He also admitted that he identified the defendant at the murder scene as the defendant sat passed out alone in the patrol car. Mr. Shehee was not shown a photographic array for identification purposes.

The defendant testified on his own behalf that he met the victim in the Hamblen County Jail and had known the victim for 15 to 16 years. He testified that almost every time that he associated with the victim they were "drinking or doing dope." On November 9, 2003, the defendant attempted to contact the victim a couple of times, and the victim called him back at approximately 9:30 p.m. The defendant and the victim met, and the two rode around in the victim's "little bitty . . . red car." The defendant testified that they drank liquor, and he "chas[ed] [the liquor] with the beer that [the defendant] had." The defendant also testified that he took three or four "blue Valiums, and two or three 10-milligram hydrocodones" that the victim gave him.

At some point, the two decided to drive to the Stuart house to get "dope." Approximately two to four miles from the house, the victim drove the car into a ditch and over a rock. The defendant testified that the wreck "tore up the front end of the car" and "knocked the battery loose." The car would not restart, so to avoid another driving under the influence charge for the victim, the two men walked into the nearby woods. The defendant testified that while walking into the woods, the victim asked him to retrieve his belongings from the car's glove compartment. Thus, he retrieved the victim's wallet, a white piece of paper, and a "bag full of medicine." Once in the woods, they continued to drink liquor and smoke cigarettes that the defendant's uncle had bought for him.

The defendant testified that because the police did not come, they returned to the car and adjusted the battery. The car started, and they drove to the Stuart house. At the house, they visited with William Stuart's father. The defendant testified that the victim instructed him to go to the bathroom because "old man" Stuart[2] would not give the victim drugs in the defendant's presence; thus, the defendant went to the restroom.

After returning from the restroom, the defendant injected himself with what he thought was liquid morphine. The defendant stated that they continued to drink and talk. At some point, the victim passed out, but the defendant continued to drink and smoke. He then asked the "old man" to take him home, but the defendant learned that the elder Mr. Stuart could not drive at night. The defendant again tried to wake the victim, but the victim demanded that the defendant leave him alone. The defendant explained that in the past when the victim would drink and ingest drugs, he would become angry and fight.

After his attempts to wake the victim were unsuccessful, the defendant continued to drink and smoke from the house's porch. The victim then came onto the porch and told the defendant that he would take him home. The defendant testified that the victim was angry because "old man" Stuart had awoken him. The defendant sat in the passenger's side of the victim's vehicle while the victim and William Stuart moved the car and attempted to jump-start the car. However, the car would not start, and Mr. Stuart re-entered the house.

The defendant testified that he could hear the victim cursing, and at one point, the victim told the defendant to "get [his] sorry ass out of the car and help him fix his car." The defendant complied and held a flashlight while the victim "beat on the battery cables" with the torque wrench. The victim blamed the defendant for the car problems, and an ensuing argument led to a fight. The defendant stated that the two men fought in front of the car, in the roadway, and on the ground in some rocks. He testified that he kicked and hit the victim although he could not remember how many times.

The defendant further testified that he became short of breath and felt like he was going to vomit due to the alcohol, so he sat in the car's passenger seat with the door open. He heard

[2]The defendant never referred to Mr. Stuart's father by his name; he referred to him as "old man."

the victim say, "I'm going to bust your f---ing head," and the victim swung the torque wrench hitting the top of the passenger-side door and striking the defendant on his shoulder. The two men fought again, and the defendant gained control of the wrench. The defendant then hit the victim with the wrench, but he could not recall how many times. He also testified that he felt scared when the victim came at him with the wrench.

The defendant only remembered one of the Stuarts "coming down" during the fight. After the fight, the defendant walked down the road. He testified that he had injured his eye, mouth, ribs, and shoulder and had scratches on his face. He also testified that he tore his blue jeans during the fight. The defendant testified that a few days after the fight, while in police custody, the police put someone else in the "drunk tank" with him, and this person said that the defendant had a black eye and bruises on his back.

When asked to identify property found on his person when arrested, the defendant testified that he got the leather jacket from his uncle, and he did not notice the tear in the back when he received it. He stated that the jacket pockets contained the "fabric softener sheets, the salt shaker thing, [and the] bandanas." The defendant also explained that he and the victim decided to steal the two watches and the scanner from a table in the Stuart house. They planned on taking the items to Newport and selling them.

The defendant testified that he felt the effects of the Valium, morphine, and alcohol the entire next day. He emphasized that he was still under the influence when the officers questioned him on the morning of November 10. Lastly, the defendant admitted to being convicted of aggravated burglary in 1995 and three misdemeanor thefts in 1994 and 1995.

On cross-examination, the defendant testified that he had just been released from a State penitentiary 11 to 12 hours prior to the murder. He first went to his uncle's house, and his uncle bought him cigarettes and gave him money to buy beer. The defendant testified that he did not have any money and that he received the morphine from "old man" Stuart on credit. The defendant explained that he planned to go to the doctor and get "Valiums, hydrocodone, [and] Somas" to sell and pay "old man" Stuart back. He explained that he had received $700 worth of pills from one doctor in the past.

The defendant testified that he was unaware of the victim's health problems and his need for oxygen.

Regarding the murder, the defendant testified that at some point, the victim possessed the torque wrench and swung it at him once. Once he took it from the victim, the victim had nothing in his hands. The defendant testified that he did not know whether he hit the victim with the wrench more than once despite hearing Dr. Mileusnic-Polchan's testimony regarding the victim's 22 head injuries. The defendant also testified that he did not think the marks on the victim's stomach came from the wrench, and he did not recall how many times he kicked the victim while they were

fighting. He also neither recalled anyone requesting him to stop beating the victim nor asking someone for a ride.

The defendant also testified that he told an officer that evening that he hit the victim in the face with his fist and that he never mentioned hitting the victim with the wrench. He stated that he did not remember the entire conversation because he was so drunk. He further admitted that he lied to the officer that night when he said the victim charged him with a tire iron. The defendant testified that when he was talking to the officers at the time of his arrest, he was unaware of the victim's death; however, he admitted that he told one officer, "I think I've killed somebody today." He further denied saying, "Clyde Reed's a piece of sh--."

The defendant testified that he and the victim stole the watches and the scanner from the Stuart house, but he denied taking the victim's knife from the victim. The defendant admitted that he had two knives on his person which belonged to him. He also denied taking the victim's wallet from the victim; he claimed that he retrieved it from the car's glove box at the victim's request.

Finally, the defendant testified that he received injuries during the fight, and he emphasized that he did not intend to kill the victim.

Frank Jenkins, Jr., testified on the defendant's behalf that he had known the victim for approximately 30 years. They drank together on several occasions, and he stated that the victim liked to fight when he got drunk. He stated that the victim would act like "he was mad at the world."

Mr. Jenkins testified on cross-examination that because the victim was in poor health, he would pick up things with which to fight. He stated that the last time he saw the victim get into a fight was in the 1980s.

In rebuttal, Cocke County Sheriff's Department Chief Detective Robert Caldwell testified that he arrived on the murder scene at approximately 3:35 a.m. on November 10. He did not speak with the defendant at that time but spoke with him around 7:25 a.m. after escorting him from jail to his office. There, he and TBI Agent Newport advised the defendant of his rights, and after the defendant waived his rights, the defendant gave a statement. Detective Caldwell did not observe any wounds on the defendant, and he stated that the defendant was coherent, responded "intelligently" to questions, and was not under any chemical influence. The defendant neither claimed that the victim hit him nor injured him. The defendant mentioned neither the watches, hitting the victim with the torque wrench, nor drinking so much that he did not remember what happened. The defendant also stated that the victim's wallet was lying on the ground.

On cross-examination, Detective Caldwell stated that the defendant was not drunk during questioning, but he did not test the defendant's blood alcohol level with the Sheriff's Department's Intoximeter. He testified that during questioning the defendant appeared to have less

blood on his face than when he was at the murder scene. Detective Caldwell also testified that he saw the tear in the defendant's pants, but he did not check to see if the defendant's knee was injured.

Steve Blanchett, a newspaper reporter, testified that on November 10, he photographed the defendant in court. He personally observed the defendant and did not see any scratches or bruises on the defendant's face. On cross-examination, however, he testified that he saw some red marks on the defendant's face on November 10 and that the defendant had discoloration at trial.

Cocke County Deputy Sheriff Ronald Hall testified that he helped arrest the defendant on November 10 along with Deputy Denton and Tennessee State Trooper Kevin Kimbro. He testified that Trooper Kimbro's patrol car's video camera recorded the arrest.

On cross-examination, Deputy Hall testified that he gave the defendant the *Miranda* warning, and the defendant responded, "I haven't been out of prison a day and already killed a man." Deputy Hall did not remember the defendant saying, "Not guilty." He did admit that at that time, the defendant appeared to be under the influence; however, on redirect examination, Deputy Hall testified that the defendant appeared to understand his rights when they were given.

Trooper Kimbro testified that he assisted Cocke County deputies on November 10 in the arrest of the defendant. He identified the videotape which was recorded by his patrol car's video camera. Trooper Kimbro testified that the tape showed Deputy Hall reading the defendant his rights. Trooper Kimbro testified that the defendant stated that he had killed someone that day and that he stated the victim "was a piece of sh--." Both statements were audible on the videotape, according to Trooper Kimbro's testimony.

Trooper Kimbro testified on cross-examination that he instructed the defendant to speak up when the defendant stated that he understood his rights. He admitted that the defendant was under the influence at that time. He further testified that the defendant said, "Not guilty," but he did not remember anyone saying, "There's a dead man down the road."

The jury convicted the defendant of first degree premeditated murder, *see* T.C.A. § 39-13-202(a)(1), first degree felony murder, *see id*. § 39-13-202(a)(2), and especially aggravated robbery, *see id*. § 39-13-403. The defendant filed a timely notice of appeal, raising three issues: (1) that there was insufficient evidence to convict the defendant of any of the charges; (2) that the trial court erred in allowing Ricky Reed, the victim's brother, to testify because Mr. Reed's name was not included on the indictment; and (3) that the trial court erred in admitting autopsy photographs.

I. Sufficiency of the Convicting Evidence

The defendant challenges the sufficiency of the evidence regarding each conviction. We will discuss each conviction in turn after addressing our standard of review.

When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). The rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *Winters*, 137 S.W.3d at 654.

In determining the sufficiency of the evidence, this court should neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id*. at 655. Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id*.

As relevant to the especially aggravated robbery conviction, Tennessee Code Annotated section 39-13-403 provides that "[e]specially aggravated robbery is robbery as defined in § 39-13-401 . . . [a]ccomplished with a deadly weapon . . . and . . . [w]here the victim suffers serious bodily injury." T.C.A. § 39-13-403. "Robbery is the intentional or knowing theft of property from the person of another by violence or putting the other person in fear." *Id*. § 39-13-401.

The defendant argues that the only evidence proving that property was taken from the victim is Mr. Reed's testimony identifying property taken from the defendant as the victim's. The defendant also contends that the items bore no blood although the defendant's hands and clothing were splattered with blood. Furthermore, the defendant argues that there was no money to take from the victim, and when searched, the defendant only possessed two nickels and five pennies. Also, no money was found in the victim's clothing. Finally, the defendant in essence asserts that the State did not prove the "accomplished with a deadly weapon" element because the victim first came at him with the deadly weapon.

First, the evidence showed that the victim had possession of his wallet, watch, and knife prior to encountering the defendant. Second, the victim was violently bludgeoned to death with a deadly weapon, a torque wrench. We note that the statute only requires that the robbery be "accomplished" with a deadly weapon and makes no mention as to the weapon's procurement. Third, the victim's property was found in the defendant's possession shortly after the murder. The jury weighed the evidence and could have discounted the fact that the property was void of blood. After considering the evidence in the light most favorable to the prosecution, we hold that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Regarding the felony murder conviction, Tennessee Code Annotated section 39-13-202(a)(2) provides that "[f]irst degree murder is . . . [a] killing of another committed in the perpetration of or attempt to perpetrate any . . . robbery." T.C.A. § 39-13-202(a)(2). The killing

may precede, coincide with, or follow the predicate felony and still be considered as occurring "in the perpetration of" the felony offense, so long as there is a connection in time, place, and continuity of action. *State v. Buggs*, 995 S.W.2d 102, 106 (Tenn. 1999).

In the present case, the jury rejected the defendant's testimony that he took the victim's belongings out of the glove compartment of the victim's car at the victim's request. The evidence also showed that the victim's pants were partially pulled down, and from the photographs taken at the scene at least one of the victim's pants pockets was exposed. The jury heard the evidence and could have reasonably inferred that the defendant killed the victim in the perpetration of the robbery. Therefore, we hold that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Finally, regarding the premeditated murder conviction, Tennessee Code Annotated section 39-13-202(a)(1) provides that "[f]irst degree murder is . . . [a] premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1) (2006). "'[P]remeditation' is an act done after the exercise of reflection and judgment." *Id*. § 39-13-202(d)).

Proof of premeditation is inherently circumstantial. The trier of fact cannot speculate what was in the killer's mind, so the existence of premeditation must be determined from the defendant's conduct in light of the circumstances surrounding the crime. *See State v. Johnny Wright*, No. 01C01-9503-CC-00093, slip op. at 9 (Tenn. Crim. App., Nashville, Jan. 5, 1996). Thus, in evaluating the sufficiency of proof of premeditation, the appellate court may look to the circumstances surrounding the killing. *See, e.g., State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997); *State v. Coulter*, 67 S.W.3d 3, 72 (Tenn. Crim. App. 2001). Such circumstances may include "the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime, and calmness immediately after the killing." *Bland*, 958 S.W.2d at 660. Although the infliction of multiple blows to the victim is not alone sufficient to establish premeditation, *see State v. Brown*, 836 S.W.2d 530, 541-43 (Tenn. 1992), repeated blows that evidence the particularly brutal nature of the killing are supportive of a jury's finding of premeditation, *see State v. Sims*, 45 S.W.3d 1, 8 (Tenn. 2001).

The evidence showed that the defendant repeatedly beat the unarmed victim with a torque wrench. The victim received 22 injuries to his head area alone, injuries to his stomach, a stomping injury to his neck, and defensive wounds on his hands. His face was "grossly deformed" and his brain exposed. Doctor Mileusnic-Polchan testified that the victim suffered numerous injuries from a weapon that were consistent with the torque wrench found in the defendant's possession covered with the victim's blood. The extent of the injuries show the brutality of the killing, and the repeated blows are relevant to establish premeditation.

Mr. Shehee witnessed this beating and identified the defendant as the perpetrator. More telling, Mr. Shehee testified that when he first arrived on the scene and witnessed the defendant beating the victim, the victim was still alive because Mr. Shehee could see him breathing. Mr.

Shehee implored the victim to stop, and the defendant ceased beating the victim long enough to ask Mr. Shehee for a ride. After Mr. Shehee refused, the defendant resumed beating the victim. Mr. Shehee further testified that the victim was alive when he left to call the police. This testimony shows the defendant not only had time to reflect, but it also shows that he was asked to stop beating the victim and consciously disregarded the request.

In addition, the defendant was found in the area shortly after the murder, and he was covered in the victim's blood, carrying the murder weapon. He acted calmly, stating "I think I've killed somebody today," and he even said, "Clyde Reed's a piece of sh--."

Considering the above circumstances, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, and we hold the evidence sufficient.

II. Allowing Witness to Testify

The defendant claims that he is entitled to a new trial because the trial court erred in allowing the victim's brother, Ricky Reed, whose name was not listed on the indictment, to testify. Mr. Reed identified the victim's property that was found on the defendant's person. The defendant claims he properly objected to this testimony and that he was prejudiced by this "late filed witness because the defense was unprepared and had set up a *portion* of it's [sic] defense on the fact that no one could identify items as coming from [the victim]." (Emphasis added.) The trial court recessed the proceedings in order to give defense counsel sufficient time to interview Mr. Reed.

Tennessee Code Annotated section 40-17-106 directs the district attorney general to endorse the names of the intended witnesses on the indictment or presentment. T.C.A. § 40-17-106 (2006). The purpose of this provision is to avoid surprising the defense and hindering its preparation of the case.[3] *See. e.g., McBee v. State*, 213 Tenn. 15, 27, 372 S.W.2d 173, 179 (1963). Notwithstanding, the Code provision is directory, not mandatory, and a trial court may permit a witness to testify even if his or her name has not been endorsed on the indictment when good cause is shown for the delay or the accused is not prejudiced. *McBee*, 213 Tenn. at 27, 372 S.W.2d at 179; *Aldridge v. State*, 4 Tenn. Crim. App. 254, 259, 470 S.W.2d 42, 45 (1971). A defendant will be entitled to relief for nondisclosure only if he or she can demonstrate "prejudice, bad faith, or undue advantage." *State v. Harris*, 839 S.W.2d 54, 69 (Tenn. 1992). Moreover, prejudice to the defendant

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[3] In *State v. Andre Dotson*, No. W2005-01594-CCA-R3-CD, slip op. at 13 (Tenn. Crim. App., Jackson, Nov. 29, 2006), which dealt with a late-filed motion to sever co-defendants' cases, the court explained "surprise" in the context of "late-arising changes in trial format," including witnesses not listed on indictments. *Id*. The court stated:

> [S]urprise means more than 'unexpected'; a defendant cannot claim surprise unless, through notice and more preparation time, he could have reacted to the new event by changing his course of action at trial. A surprise is typically remedied, not by barring a new development that is otherwise a matter of proper advocacy, but by granting a continuance if the defendant asks for one.

Id.

must result from the lack of notice not the prejudice which resulted from the witness's testimony. *See State v. Fallon L. Tallent*, No. M2005-00183-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App., Nashville, Jan. 10, 2006) (citing *State v. Jesse Eugene Harris*, No. 88-188-III, slip op. at 8 (Tenn. Crim. App., Nashville, June 7, 1989). Furthermore, Tennessee Rule of Criminal Procedure 16 does not authorize pretrial discovery of the names and addresses of the State's witnesses. *See State v. Martin*, 634 S.W.2d 639, 643 (Tenn. Crim. App. 1982).

Here, although the State did not comply with the directory statute, the defendant failed to show prejudice. Defense counsel objected to Mr. Reed's testimony, and after he informed the trial court that he lacked the opportunity to interview the witness, the court recessed, allowing defense counsel this opportunity. Further, defense counsel ably cross-examined the witness regarding the property. We hold that the trial court did not abuse its discretion in allowing Mr. Reed to testify. *See State v. Joel Guilds*, No. 01C01-9804-CC-00182, slip op. at 7 (Tenn. Crim. App., Nashville, May 27, 1999) (holding defendant did not show prejudice as a result of a late witness because defense counsel had an opportunity to interview the witness before the witness testified, and defense counsel ably cross-examined the witness).

III. Trial Court Erred in Admitting Autopsy Photographs

The defendant argues that the trial court committed reversible error in admitting the autopsy photographs into evidence because they were "too gruesome and graphic and would upset and inflame the passions of the jurors and prevent [the defendant] from receiving a fair and impartial trial by jury."

To be admissible, a photograph must be relevant to some issue at trial, and the prejudicial effect of the photograph must not outweigh its probative value. *State v. Bush*, 942 S.W.2d 489, 514 (Tenn. 1997); *State v. Banks*, 564 S.W.2d 947, 951 (Tenn. 1978); *see also* Tenn. R. Evid. 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence); Tenn. R. Evid. 403 (stating that "relevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"). The admissibility of photographs is within the sound discretion of the trial court, and the court's determination will not be overturned on appeal except upon a clear showing of an abuse of discretion. *Bush*, 942 S.W.2d at 514; *State v. Bordis*, 905 S.W.2d 214, 226 (Tenn. Crim. App. 1995). Moreover, an abuse of discretion is only present when the trial court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997).

In addition, "an accused cannot marshal the evidence of the state by simply offering to stipulate to a fact for the purpose of barring the state from introducing admissible, demonstrative evidence the accused does not want the jury to see." *State v. Griffis*, 964 S.W.2d 577, 595 (Tenn. Crim. App. 1997); *see also State v. West*, 767 S.W.2d 387, 394 (Tenn. 1989) (holding that the trial

judge did not err by refusing to accept defendant's offer to stipulate the identity of all property when the defendant made the offer in an effort to eliminate highly emotional and prejudicial testimony).

In the present case, the trial court admitted the photographs, stating that they were admissible to show the extent of the victim's injuries. The trial judge emphasized that the photographs may be the only way for the State to do so. Although the photographs were gruesome, they were highly probative in establishing elements of the crimes. They tend to show the premeditation element of first degree murder. *See State v. Faulkner*, 154 S.W.3d 48, 70 (Tenn. 2005) (holding that the admitted photographs showing repeated blows to the head were not too prejudicial because they were relevant to show the element of premeditation). We conclude that the trial court did not abuse its discretion in admitting the photographs.

III. Merger

When a defendant is charged with two theories of first degree murder, the trial court should instruct the jury to render a verdict on both theories. *See State v. Howard*, 30 S.W.3d 271, 275 (Tenn. 2000). Yet, "when only one person has been murdered, a jury verdict of guilt on more than one count of an indictment charging different means of committing first degree murder will support only one judgment of conviction for first degree murder." *State v. Cribbs*, 967 S.W.2d 773, 788 (Tenn. 1998). Merger avoids a double jeopardy problem while protecting the jury's findings. *Howard*, 30 S.W.3d at 275. Thus, judgments of conviction were erroneously entered for both first degree murder findings of guilt. Due to constitutional double jeopardy principles, the judgments must be vacated and replaced by one judgment that imposes *a single conviction* of first degree murder.

IV. Conclusion

For the foregoing reasons, we affirm both verdicts of first degree murder, but we vacate the judgments that impose the first degree murder convictions. We remand these convictions for the purpose of the trial court's entering a new judgment that imposes the merger-surviving first degree murder conviction and that acknowledges the merger of the other first degree murder verdict into that surviving conviction. The judgment of conviction of especially aggravated robbery is affirmed and remains undisturbed.

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JAMES CURWOOD WITT, JR., JUDGE